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3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Facsimile (702) 949-8321
Telephone (702) 949-8320

Susan M. Freeman AZ State Bar No. 004199
Email: sfreeman@lrlaw.com
Rob Charles NV State Bar No. 006593
Email: rcharles@lrlaw.com
John Hinderaker AZ State Bar No. 018024
Email: jhinderaker@lrlaw.com

Attorneys for USACM Liquidating Trust
ORRICK, HERRINGTON & SUTCLIFFE LLP
MARC A. LEVINSON (CA 57613, pro hac vice)
JEFFERY D. HERMANN (CA 90445, pro hac vice)
400 Capitol Mall
Sacramento, California 95814
Telephone: (916) 447-9200
Facsimile: (916) 329-4900
Email: malevinson@orrick.com
ihermann@orrick.com

BECKLEY SINGLETON, CHTD.
BOB L. OLSON (NV 003783)
ANNE M. LORADITCH (NV 008164)
530 Las Vegas Boulevard South
Las Vegas, NV 89101
Telephone: (702) 385-3373
Facsimile: (702) 385-5024
Email: bolson@beckleylaw.com
aloraditch@beckleylaw.com

Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE COMPANY,

USA CAPITAL REALTY ADVISORS, LLC,

USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

USA CAPITAL FIRST TRUST DEED FUND, LLC,

USA SECURITIES, LLC,

Debtors.

Affects:

- All Debtors
 - USA Commercial Mortgage Company
 - USA Capital Realty Advisors, LLC
 - USA Capital Diversified Trust Deed Fund, LLC
 - USA Capital First Trust Deed Fund, LLC
 - USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case No. BK-S-06-
10725 LBR

**Objection of USACM Trust To William Daley
Claim Filed in Wrong Debtor's Case; Objection
of DTDF to Proposed Allowance of Claim; and
Certificate of Service**

Hearing Date: October 15, 2007
Hearing Time: 9:30 a.m.

William Daley (“Daley”) filed Proof of Claim No. 10725-00448 against USA Commercial Mortgage Company (“USACM”) in the amount of \$134,179.22. The USACM Liquidating Trust (the “USACM Trust”) hereby objects to Daley’s claim. The



1 basis for the claim is shown on the face of the proof of claim and in the attachment as an
 2 investment in USA Capital Diversified Trust Deed Fund, LLC ("DTDF"). Accordingly, it
 3 is a claim that was incorrectly filed in the USACM case. The USACM Trust respectfully
 4 requests that this claim be disallowed as a claim against USACM. Although DTDF has
 5 not yet filed a formal proof of claim against USACM, and there is no deadline for it to do
 6 so, DTDF has informally asserted a claim in excess of \$100 million and the parties have
 7 participated in one unsuccessful mediation on this and other issues. Because DTDF does
 8 assert a significant claim against USACM, any claim held by Daley against USACM
 9 solely on account of the investment in DTDF is derivative of DTDF's claims against
 10 USACM, and Daley may not prosecute such claims on Daley's own behalf.

11 In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which
 12 owned two subsidiaries.¹ The president of Van Dresser looted the subsidiaries, ultimately
 13 forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125
 14 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then
 15 sued the debtor's principal, and two other defendants (who he alleged aided and abetted
 16 the corporate looting) for various torts, including conversion, breach of fiduciary duty, and
 17 civil conspiracy.

18 The court stated that a debtor's trustee has the exclusive right to assert a debtor's
 19 claims, and that a claim belongs solely to the debtor's estate if the debtor could have raised
 20 the claim at the commencement of the bankruptcy case.² Additionally, if a judgment
 21 against a defendant by either the debtor or another party asserting the debtor's claim
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 23
 24

¹ *In re Van Dresser Corp.*, 128 F.3d 945 (6th Cir. 1997).

² *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994); see also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with approval in a case involving an LLC debtor)).



1 precludes the other from recovery, then the claims are not independent of each other and
 2 belong exclusively to the debtor.³

3 Thus, because both the plaintiff and the debtor corporation could state claims for
 4 damages against the defendants, but only one could recover on those claims, by default the
 5 claims were exclusively property of the Van Dresser trustees.⁴ In order for a plaintiff to
 6 bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must
 7 be able to allege a distinct and specific injury.⁵

8 Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset
 9 purchase agreement that specifically included the assumption of debt owed to the debtor's
 10 managing member. The agreement fell through, and after the managing member filed an
 11 involuntary petition for relief against the debtor, the managing member asserted various
 12 causes of action against the purchasing company, including contract claims, debt
 13 assumption claims, misrepresentation claims, and interference claims.⁶ The court,
 14 however, found that all of the claims involved both the debtor's managing member and the
 15 debtor itself, and thus the right to pursue all of the causes of action resided with the
 16 trustee.⁷

17 DTDF further objects to any allowance of Daley's claim as a claim against the
 18 DTDF estate. DTDF has determined that Daley has an allowed proof of interest in the
 19 DTDF case in the amount of \$134,179.22. This objection does not seek to prejudice the

21 ³ *Id.*

22 ⁴ *Id.* at 948.

23 ⁵ *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the
 suits on the guaranty).

24 ⁶ *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

25 ⁷ See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine
 whether action is individual or derivative based on state law, and the preferred
 shareholders breach of fiduciary duty claims were derivative per Delaware law); *In re Van
 Dresser*, 128 F.3d at 947 ("whether a creditor has sole right to a cause of action is
 determined in accordance with state law").



1 rights of Daley as a DTDF member to recover from the DTDF estate on a pro rata basis on
 2 account of Daley's membership interest in the amount of \$134,179.22. Daley shall retain
 3 an interest in DTDF in the amount of \$134,179.22, as reflected in the books and records of
 4 DTDF, and Daley is entitled to receive distributions on a pro rata basis with all other
 5 DTDF members.

6 Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow
 7 the Daley's claim against USACM, disallow any proposed allowance of the Daley's claim
 8 in the DTDF case, and appropriately allow Daley to retain an equity interest in DTDF in
 9 the amount of \$134,179.22 as reflected in the books and records of DTDF as of April 13,
 10 2006.

11 This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of
 12 Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

13 Dated: August 31, 2007.
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15 BECKLEY SINGLETON, CHTD.

16 By /s/ Anne M. Loraditch
 17 Bob L. Olson (NV Bar #3783)
 Anne M. Loraditch (NV Bar # 8164)
 18 530 Las Vegas Boulevard South
 Las Vegas, Nevada 89101
 Telephone: (702) 385-3373

19 and

20 **ORRICK, HERRINGTON &**
SUTCLIFFE LLP
 21 Marc A. Levinson
 Jeffery D. Hermann
 22 400 Capitol Mall, Suite 3000
 Sacramento, California 95814-4497
 23 *Attorneys for Post-Effective Date USA*
 Capital Diversified Trust Deed Fund, LLC

LEWIS AND ROCA LLP

By: /s/ Rob Charles (006593)
 Susan M. Freeman
 Rob Charles
 John Hinderaker
 3993 Howard Hughes Parkway, Suite 600
 Las Vegas, NV 89169-0961
 Facsimile (702) 949-8321
 Telephone (702) 949-8320
 Counsel For USACM Liquidating Trust



Certificate of Service

I certify that a copy of the foregoing was served via first class mail, postage prepaid, addressed as set forth below, on this 31st day of August, 2007 to:

William Daley
162 Obed Point
Corssville, TN 38571

/s/ Renee L. Creswell

Renee L. Creswell
Lewis and Roca LLP